MISSOURI COURT OF APPEALS WESTERN DISTRICT

JAMES KEVIN GREEN,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

DOCKET NUMBER WD74939 **Date: November 6, 2012**

Appeal from:

Clay County Circuit Court

The Honorable Janet Sutton, Judge

Appellate Judges:

Division Three: Alok Ahuja, P.J., Victor C. Howard and Cynthia L. Martin, JJ.

Attorneys:

Jeffrey S. Eastman, Gladstone, MO, for appellant.

Samuel E. Buffaloe, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY COURT OF APPEALS -- WESTERN DISTRICT

JAMES KEVIN GREEN

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

WD74939 Clay County

James Green was arrested for driving while intoxicated, and taken to the Clay County Detention Center. After advising Green of Missouri's Implied Consent Law, the arresting officer asked Green to submit to a blood-alcohol test. Green indicated that he wished to speak with an attorney. Green gave the officer the name and number of an attorney to contact. The officer dialed the number and handed the telephone to Green. Green spoke to the person on the other end of the line for several minutes. At the conclusion of Green's telephone conversation, he told the officer that he had spoken to attorney Fuller. The officer again asked Green whether he would submit to a chemical test of his breath. Green stated, "I'm not sure." The officer told Green that he needed a "yes or no" answer, and Green then replied "no." Green's refusal occurred thirteen minutes after his request to contact an attorney. Because of Green's refusal to submit to chemical testing, the officer issued Green a notice on behalf of the Department of Revenue, revoking his driving privileges.

Green petitioned for judicial review of the revocation of his driving privileges. After a trial at which the arresting officer testified, the circuit court upheld the Director of Revenue's revocation decision. Green appeals.

AFFIRMED

Division Three holds:

Section 577.041.3, RSMo, requires the Director of the Department of Revenue to revoke the driving privileges of an individual who refuses to consent to a chemical test after being arrested on reasonable grounds to believe that the individual was driving while intoxicated. Under § 577.041.1, RSMo, when a driver who has been asked to submit to a chemical test requests to speak with an attorney, "the person shall be granted twenty minutes in which to attempt to contact an attorney. If upon the completion of the twenty-minute period the person continues to refuse to submit to any test, it shall be deemed a refusal."

Section 577.041.1 does not mean, however, that the police must wait twenty minutes before asking a driver whether he will submit to a chemical test, in every case where the driver requests to speak with an attorney. Instead, where a driver is given an opportunity to contact an attorney after requesting to speak with one, § 577.041.1 is satisfied if the twenty minute statutory period expires, <u>or</u> if the driver abandons his attempts to contact an attorney. Abandonment is established when the driver ceases attempting to contact a lawyer and indicates that he intends to make no additional attempts to contact an attorney within the twenty minute period.

Whether a driver in a particular case abandoned or concluded his efforts to contact an attorney is a factual issue, on which we generally defer to the trial court's findings. In this case, substantial evidence supports the circuit court's finding that Green had concluded his attempts to contact an attorney before refusing the chemical test. Green gave the arresting officer the phone number for his attorney, spoke to the individual whom the arresting officer called for several minutes, and told the officer that he had spoken with his attorney. Green then refused the test. Although Green did not explicitly state that he had concluded his efforts to contact an attorney, and the officer did not ask him if he had concluded those efforts, Green's actions of speaking with his attorney, and then responding to the officer's renewed request for a chemical test, permitted the trial court to find that his efforts to contact an attorney had concluded.

Before: Division Three: Alok Ahuja, P.J., Victor C. Howard and Cynthia L. Martin, JJ.

Opinion by: Alok Ahuja, Judge November 6, 2012

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.